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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CITY OF CORONA

Plaintiff, Cross-defendant and  
Respondent,

v.

AMG OUTDOOR ADVERTISING, INC.  
et al.,

Defendants, Cross-complainants and  
Appellants.

E068313

(Super.Ct.No. RIC1412756)

OPINION

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge.

Affirmed with directions.

The Mellor Law Firm and Mark A. Mellor for Defendants, Cross-complainants  
and Appellants.

Dean Derleth, City Attorney, and John D. Higginbotham, Assistant City Attorney,  
for Plaintiff, Cross-defendant and Respondent.

## I. INTRODUCTION

This is another action in a long line of cases challenging the constitutionality, on First Amendment grounds, of a city's ban on "off-site" billboards. (See *Lamar Central Outdoor, LLC v. City of Los Angeles* (2016) 245 Cal.App.4th 610, 614-615 (*Lamar*).) In 2004, plaintiff, cross-defendant, and respondent, City of Corona (the City), adopted ordinance No. 2729 (the 2004 ordinance), banning the placement anywhere in the City of new "off-site" billboards or "outdoor advertising signs," regardless of their content, but allowing "grandfathered" billboards (those placed in the City before the 2004 ordinance went into effect) to be relocated in the City pursuant to a relocation agreement with the City.

In December 2014, defendant, cross-complainant, and appellant, AMG Outdoor Advertising Inc. (AMG), erected a new billboard in the City (the AMG billboard), on private property near State Route 91, in defiance of the 2004 ordinance and without a city or state permit. The City promptly sued AMG and other defendants to remove the AMG billboard. In January 2016, this court affirmed the trial court's January 23, 2015, preliminary injunction requiring AMG and other defendants to cease using and remove the AMG billboard. (*City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 307 (*AMG I*).)

Following the preliminary injunction, the City filed a first amended complaint (FAC) against AMG and other defendants, and following *AMG I*, defendants filed a first amended cross-complaint (FACC) against the City. The trial court granted the City's two

motions for summary judgment—the first on the FACC and the affirmative defenses to the FAC, and the second on the FAC—and entered judgment in favor of the City on the FACC and FAC. The judgment permanently restrains defendants from constructing, erecting, or operating any billboard in the City without obtaining all required city and state permits, and imposes statutory penalties on the AMG defendants pursuant to California’s Outdoor Advertising Act (the OAA). (Bus. & Prof. Code, § 5200 et seq.)<sup>1</sup>

In this appeal, three of the defendants and cross-complainants, namely, AMG, Alex M. Garcia (AMG’s chief executive officer), and Rockefellas (a bar and music venue in the City, primarily owned by Garcia) (collectively, the AMG defendants), appeal from the judgment in favor of the City. In their FACC, the AMG defendants allege the 2004 ordinance is unconstitutional both because it is content-based and because it is unconstitutionally underinclusive in that it does not ban *all* off-site signs *and* in that it allows grandfathered billboards to be relocated in the City *and modified* to include larger, nonstatic digital displays. The FACC alleges that allowing grandfathered billboards to be modified to include digital displays undermines the City’s stated purposes in enacting the 2004 ordinance of improving the City’s traffic safety and the City’s appearance or aesthetics.

The AMG defendants claim the City, in moving for summary judgment on the FACC, failed to meet its initial burden of showing that the AMG defendants could not

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<sup>1</sup> All further statutory references are to the Business and Professions Code unless otherwise indicated.

prove their content-based and underinclusivity claims as alleged in the FACC. They also claim they raised triable issues of fact concerning these constitutional claims. Lastly, the AMG defendants claim the judgment erroneously makes them jointly and severally liable to the City to disgorge gross revenues received by or owed to AMG for the advertising on the AMG billboard. (§ 5485, subd. (c).)

As we explain, the City met its initial burden, in moving for summary judgment on the FACC, of showing that the AMG defendants could not prove their content-based and underinclusivity claims as a matter of law. These claims have effectively been rejected in *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490, 506-511 (*Metromedia*), in *Lamar*, and in several Ninth Circuit Court of Appeals cases rejecting similar underinclusivity challenges to the City of Los Angeles's off-site billboard ban. (See *Lamar, supra*, 245 Cal.App.4th at pp. 615-616, 630-633.) The AMG defendants did not raise any triable issues of fact concerning their constitutional claims.

We agree, however, that the judgment must be amended to strike the disgorgement penalties imposed on the AMG defendants pursuant to section 5485, subdivision (c). The undisputed evidence adduced on the City's motion on the FAC shows that no gross revenues were ever received by or owed to any of the AMG defendants for the advertising displays on the AMG billboard. Thus, we affirm the judgment with directions to strike the portion making the AMG defendants jointly and severally liable to the City for these disgorgement penalties. In all other respects, we affirm the judgment.

## II. FACTS AND PROCEDURAL BACKGROUND

### A. *The 2004 Ordinance and Related Corona Municipal Code (CMC) Provisions*<sup>2</sup>

On September 1, 2004, the City adopted the 2004 ordinance, which amended the CMC to prohibit new “off-site” billboards or “outdoor advertising signs” anywhere in the City, but allowing “grandfathered” billboards—those placed in the City before the 2004 ordinance went into effect—to be relocated in the City pursuant to a relocation agreement with the City. (CMC, §§ 17.74.070(H), 17.74.160.)

CMC section 17.74.160 states: “Except as provided in section 17.74.070(H), outdoor advertising signs (billboards) are prohibited in the City of Corona. The city shall comply with all provisions of the California Business & Professions Code regarding amortization and removal of existing off-premise[s] and outdoor advertising displays and billboards signs.” The CMC defines an “Outdoor advertising sign (Billboards)” as a specific type of “off-site sign.” An “off-site sign” generally means “any sign which is not located on the business or activity site it identifies or advertises.” (CMC, § 17.74.030(O)(42).) In contrast, an “Outdoor advertising sign (Billboards)” means “any sign with a commercial or non-commercial message . . . which directs attention to a business, commodity, service or entertainment conducted, sold or offered *elsewhere than upon the premises where the sign is located*, or to which [the sign] is affixed. . . .”

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<sup>2</sup> In ruling on the motions for summary judgment, the trial court took judicial notice of the 2004 ordinance and the CMC provisions described in this section. We do the same. (Evid. Code, § 459, subd. (a); see *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1.)

(CMC, § 17.74.030(O)(44), italics added.) Thus, by only prohibiting “Outdoor advertising signs (Billboards),” the 2004 ordinance does not prohibit “on-site” signs—defined as signs “direct[ing] attention to an occupancy, business, commodity, service or entertainment conducted, sold or offered only upon the premises where the sign is located.” (CMC, §§ 17.74.160, 17.74.030(O)(43).)

CMC section 17.74.070(H) allows grandfathered off-site billboards to be relocated in the City pursuant to a relocation agreement with the City. In 2006, the City adopted ordinance No. 2864 (the 2006 ordinance) which amended CMC section 17.74.070(H) to require a relocation agreement with the City in order to *replace a static billboard face* with an electronic message center, electronic message board, or changeable message board—in short, a digital display—even if the billboard is not relocated. Pursuant to CMC section 17.74.070(H), the replacement of a static billboard face with a digital display is considered a “relocation.”<sup>3</sup>

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<sup>3</sup> The 2006 ordinance amended CMC section 17.74.070(H) to state: “[C]onsistent with the California Business & Professions Code Outdoor Advertising provisions, new off-premises advertising displays, including electronic message centers, electronic message boards, and changeable message boards, may be considered and constructed as part of a relocation agreement . . . entered into between the [C]ity . . . and a billboard and/or property owner where one or more nonconforming billboards owned by the billboard and/or property owner and located elsewhere in the [C]ity are removed. The replacement of a static billboard face with an electronic message center, electronic message board, or changeable message board shall be considered a relocation for purposes of this section. Such agreements may be approved by the City Council upon terms that are agreeable to the [C]ity and/or redevelopment agency in their sole and absolute discretion.”

The 2004 and 2006 ordinances are consistent with the OAA (§ 5200 et seq.), which expressly authorizes and encourages cities and other local governmental entities to enter into relocation agreements with existing billboard owners and operators in lieu of expending public funds to condemn the billboards by eminent domain. Section 5412 of the OAA states: “[N]o advertising display which was lawfully erected anywhere within this state shall be compelled to be removed, nor shall its customary maintenance or use be limited . . . without payment of compensation, as defined in the Eminent Domain Law . . . . [¶] . . . [¶] It is a policy of this state to encourage local entities and display owners to enter into relocation agreements which allow local entities to continue development in a planned manner without expenditure of public funds while allowing the continued maintenance of private investment and a medium of public communication. Cities . . . are specifically empowered to enter into relocation agreements on whatever terms are agreeable to the display owner and the city . . . and to adopt ordinances or resolutions providing for relocation of displays.”

As part of the 2004 ordinance, the City made several factual findings, including that “signs and other graphics are essential elements of a community’s visual appearance.” The City also found that its sign regulations, including the 2004 ordinance, were intended, among other things, “[t]o encourage a desirable urban character which has a minimum of overhead clutter”; “[t]o enhance the economic value of the City’s community and each area thereof through the regulation of such things as size, height, location, and illumination of signs”; “[t]o reduce possible traffic and safety hazards to

motorists and pedestrians through sound signing practices”; and “[t]o preserve and improve the appearance of the City . . . .” We refer to these findings as the City’s findings concerning “traffic safety and aesthetics.”

The CMC generally prohibits *any* off-site sign to be erected in the City without a City building permit. (CMC, § 15.02.070.) The OAA also requires a permit from the California Department of Transportation (Caltrans) to erect a billboard in any area affected by the OAA. (Bus. & Prof. Code, § 5350.) The CMC makes it unlawful for any person to violate or fail to comply with the CMC, and deems a public nuisance any condition caused or permitted to exist in violation of the CMC. (CMC, § 1.08.020.) The CMC authorizes the City to abate any such public nuisance in a civil action. (CMC, §§ 1.08.020, 8.32.210.)

#### *B. Additional Undisputed Evidence*

Over the weekend of December 6 and 7, 2014, AMG erected a monopole V-shaped or two-sided billboard, with 14-foot by 48-foot static displays on each side, on the property located at 3035 Palisades Drive in the City. Curlan, Ltd. owned the property and Sid’s Carpet Barn, Inc. occupied the property. One side of the billboard featured an advertisement for Rockefellas. The other side featured an advertisement for Pala Casino Resort and Spa (Pala), located near Fallbrook. Rockefellas and Pala each agreed to pay AMG \$8,000 per month for the advertising.<sup>4</sup>

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<sup>4</sup> Along with the AMG defendants, Curlan Ltd., Sid’s Carpet Barn, Inc., and Pala were named as defendants in the City’s original complaint and in the FAC, but they are

AMG did not have a City permit (CMC, § 15.02.070) or a state permit from Caltrans (Bus. & Prof. Code, § 5350) to erect the AMG billboard. AMG could not have received a building permit from the City to erect the AMG billboard, because the AMG billboard was not traceable to a grandfathered billboard erected in the City before the 2004 ordinance went into effect. (CMC, § 17.74.160.) Nor could AMG have obtained a permit from Caltrans to erect the AMG billboard, because the City had not approved the location of the AMG billboard. (Bus. & Prof. Code, § 5354.)

On December 10 and 19, 2014, the City sent cease and desist letters to defendants and their counsel, advising them that the billboard violated the CMC and demanding its prompt removal. On December 23, counsel for AMG advised the City by letter that the 2004 ordinance banning all new off-site billboards violated AMG's free speech rights and was also unconstitutional as applied to AMG because the City was allowing another billboard operator, Lamar, to erect multiple billboards in the City notwithstanding the 2004 ban. AMG advised the City that it was "prepared to construct multiple" billboards in the City unless AMG and the City reached an agreement.

Since September 1, 2004, the City has not allowed any off-site billboards to be erected in the City except pursuant to an approved relocation agreement. As of January 2015, only two entities, Lamar and General Outdoor Advertising, owned and operated

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not parties to this appeal. (*AMG I*, *supra*, 244 Cal.App.4th at pp. 294, fn. 1 & 297.) The FAC also named other defendants who are not parties to this appeal.

billboards in the City, and each of their billboards was either a grandfathered billboard or was traceable to a grandfathered billboard. Several of the Lamar and General Outdoor Advertising billboards either had been or were in the process of being relocated in the City, but all of these relocations were pursuant to relocation agreements with the City.

*C. Procedural Background: The Initial Litigation and Preliminary Injunction*

On December 30, 2014, the City filed suit against the AMG defendants and others, seeking injunctive relief and other remedies based on defendants' unauthorized erection, operation, and use of the AMG billboard. (*AMG I, supra*, 244 Cal.App.4th at p. 297.)

On January 16, 2015, AMG and Rockefellas cross-complained against the City for declaratory relief, an injunction prohibiting the City from enforcing the 2004 ordinance, and a writ of mandate ordering the City to issue a building permit for the AMG billboard.<sup>5</sup> (*Ibid.*)

On January 23, 2015, the trial court issued a preliminary injunction prohibiting each of the defendants from operating, allowing, using, and advertising on the AMG billboard, ordering defendants to immediately remove the billboard, and prohibiting defendants from erecting any additional billboards in the City without first obtaining all

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<sup>5</sup> In 2015, California Outdoor Equities Partners, LLC (COEP) became a 50 percent joint venture partner with AMG to build and operate billboards in the City, including the AMG billboard. In April 2015, COEP sued the City in federal court, seeking the same relief AMG and Rockefellas was seeking by their initial cross-complaint against the City. (*AMG I, supra*, 244 Cal.App.4th at p. 298, fn. 5.) On July 9, 2015, the federal district court granted the City's motion to stay the federal case until the present state court litigation had concluded. (*California Outdoor Equity Partners v. City of Corona* (C.D. Cal. July 9, 2015, No. CV 15-03172 MMM (AGRx)) 2015 U.S. Dist. Lexis 89454.)

required city and state permits. (*AMG I*, *supra*, 244 Cal.App.4th at p. 297.) Following the preliminary injunction, the AMG billboard was not immediately removed or taken down. On June 27, 2015, the advertising displays were removed from the AMG billboard, and on December 3, 2015, the AMG billboard was finally taken down. In January 2016, this court affirmed the preliminary injunction in *AMG I*. (*Id.* at p. 307.)

*D. The Operative FAC and FACC*

In May 2015, the City filed the FAC against the AMG defendants and others, alleging causes of action for public nuisance, OAA violations, and declaratory relief. By the FAC, the City sought a permanent injunction against the further use and operation of the AMG billboard, along with other remedies, including statutory penalties pursuant to the OAA. In August 2016, the AMG defendants and other cross-complainants filed the FACC against the City, alleging a single claim for declaratory relief, claiming that the 2004 ordinance was unconstitutional, both on its face and as applied to the AMG defendants under the federal and state Constitutions.

*E. The City's Two Motions for Summary Judgment and the Judgment*

The City filed two motions for summary judgment—the first on the FACC and on the affirmative defenses to the FAC, and the second on the FAC, including the City's claims for attorney fees and statutory penalties under the OAA. The motions were granted,<sup>6</sup> and judgment in favor of the City was entered on both the FAC and the FACC.

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<sup>6</sup> The court vacated its October 11, 2016, order granting the City's first motion for summary judgment after the AMG defendants objected to both the form of the order and the proposed judgment on the ground that the City's first motion did not seek summary

The judgment declared the 2004 ordinance and chapter 17.74 of the CMC constitutional, both facially and as applied to all of the defendants under the federal and state Constitutions.

The judgment imposed several statutory penalties under the OAA. As pertinent to this appeal, the judgment requires AMG and Garcia, jointly and severally, to pay the City “disgorgement of gross revenues received by or owed to them” (§ 5485, subd. (c)), “in the sum of \$106,257.52 (i.e., for the 202 days the two advertisements were illegally displayed from December 7, 2014 through June 27, 2015, at the contracted advertising rate of \$8,000.00 per face, per month), with Rockefellas jointly and severally liable for one-half of that sum (i.e., \$53,128.76 for the 202 days the Rockefellas advertisement was displayed . . . ).”<sup>7</sup> The AMG defendants timely appeal from the judgment.

### III. STANDARD OF REVIEW

Summary judgment is properly granted if all the papers submitted on the motion show there are no triable issues of material fact and the moving party is entitled to

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judgment on the FAC, but only on the FACC and the affirmative defenses to the FAC. The court invited the City to file a *second* motion for summary judgment on the FAC, the City did so, and the court granted the second motion on March 6, 2017.

<sup>7</sup> The judgment also requires AMG and Garcia, jointly and severally, to pay the City \$45,800 (§ 5485, subd. (b)), comprised of \$10,000 plus \$100 for each of the 358 days the AMG billboard was not removed following the City’s December 10, 2014, written demand, to December 3, 2015, the day the AMG billboard was finally removed. The judgment also awarded the City its costs of suit against all defendants and requires the AMG defendants to pay the City its reasonable attorney fees. (§ 5485, subd. (e).) The court later awarded the City \$357,000 in attorney fees. None of these fines, costs, or attorney fees have been challenged on appeal.

judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We review an order granting summary judgment de novo, considering all of the evidence adduced on the motion (except evidence the trial court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.*, *supra*, at p. 476.) We liberally construe the evidence in favor of the opposing party and resolve all doubts concerning the evidence in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

A defendant moving for summary judgment (here, the City on the FACC) bears the initial burden of showing that the plaintiff's causes of action have no merit. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 849-851 (*Aguilar*).) The defendant meets this burden by making a prima facie evidentiary showing that (1) one or more elements of each cause of action cannot be established, or (2) there is a complete defense to each cause of action. (*Id.* at p. 849; Code Civ. Proc., § 437c, subds. (o), (p)(2).) If the defendant makes this showing, the burden shifts to the plaintiff to produce evidence of a triable issue of material fact concerning the element or defense. (*Aguilar, supra*, at pp. 849-851; Code Civ. Proc., § 437c, subd. (p)(2).)

A plaintiff moving for summary judgment (here, the City on the FAC) bears the initial burden of showing that there is no defense to the plaintiff's causes of action. (*Aguilar, supra*, 25 Cal.4th at pp. 843, 849.) The plaintiff meets this burden by proving each element of the cause of action entitling him to judgment on that causes of action. (*Id.* at p. 849; Code Civ. Proc., § 437c, subd. (p)(1).) If the plaintiff makes this showing,

the burden shifts to the defendant to show there is at least one triable issue of material fact concerning an element of the cause of action or a defense thereto. (*Aguilar, supra*, at pp. 849-851.) Generally, and from commencement to conclusion on a motion for summary judgment, the moving party, whether plaintiff or defendant, bears the burden of *persuasion* that there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Id.* at p. 850 & fn. 11.)

#### IV. DISCUSSION

##### A. *The AMG Defendants' Constitutional Challenges to the 2004 Ordinance Lack Merit*

The AMG defendants claim that the City, in moving for summary judgment on the FACC, failed to meet its initial burden of making a *prima facie* evidentiary showing that the AMG defendants were unable to prove that the 2004 ordinance is unconstitutional, either facially or as applied to the AMG defendants, for the reasons alleged in the FACC. The AMG defendants also claim they showed there were triable issues of material fact concerning whether the 2004 ordinance is unconstitutional.<sup>8</sup>

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<sup>8</sup> In their opening brief, the AMG defendants principally argue that the trial court mistakenly believed that this court's analysis and decision in *AMG I* disposed of all of the AMG defendants' facial and "as applied" challenges to the 2004 ordinance alleged in the FACC. But we are not bound by the trial court's reasons for granting the motion. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 927.) Our review is *de novo*, and we independently apply the same three-step process required of the trial court. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 939-940.)

At the hearing on the City's motion for summary judgment on the FACC, counsel for the AMG defendants clarified that the AMG defendants were no longer claiming, as they did in *AMG I*, that the 2004 ordinance violated their equal protection rights or their free speech rights under the California Constitution. In *AMG I*, this court rejected these claims based on essentially the same undisputed factual record adduced on the City's

We conclude the City met its initial burden of showing that the AMG defendants’ facial and as applied challenges to the 2004 ordinance lack merit, and, in turn, the AMG defendants failed to raise any triable issues of material fact in support of their claims.

1. The 2004 Ordinance Is Not Content-based or Subject to Strict Scrutiny

The FACC alleged the 2004 ordinance is a content-based restriction on speech and is unconstitutional because it cannot pass the strict scrutiny test required of content-based restrictions. (*Reed v. Town of Gilbert* (2015) 576 U.S. \_\_\_, \_\_\_ [135 S.Ct. 2218, 2226-2227 [content-based regulations on speech are presumptively unconstitutional and are subject to strict or heightened judicial scrutiny, meaning they are unconstitutional unless the government proves they are narrowly tailored to serve a compelling state interest].) In moving for summary judgment on the FACC, the City adduced the 2004 ordinance, which on its face bans *all* new off-site billboards except grandfathered billboards, regardless of the billboards’ content.

As noted in *AMG I*, “the 2004 ordinance is content neutral: it bans all off-site billboards, regardless of their commercial or noncommercial content.” (*AMG I, supra*, 244 Cal.App.4th at p. 304, fn. 9.)<sup>9</sup> By adducing the 2004 ordinance, the City met its

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motions for summary judgment. (*AMG I, supra*, 244 Cal.App.4th at pp. 296-207, 300, 302-307.)

<sup>9</sup> As the *Lamar* court later observed, the terms “‘commercial’ and ‘noncommercial’ necessarily refer, in the broadest sense, to the ‘content’ of a sign. But plainly the term ‘content-based,’ in free speech jurisprudence . . . ordinarily does not refer to whether speech is commercial or noncommercial” but more broadly refers to “the ‘topic discussed or the idea or message expressed’ or to ‘specific subject matter . . . .’”

initial burden of showing that the FACC’s content-based allegations could not be proved. This shifted the burden to the AMG defendants to show there was a triable issue of fact that the 2004 ordinance was content-based or was being applied in a content-based manner. (See *Aguilar, supra*, 25 Cal.4th at pp. 849-850.) The AMG defendants adduced no such evidence. Thus, the FACC’s content-based allegations were properly adjudicated in favor of the City. (Code Civ. Proc., § 437c, subd. (f).)

## 2. The 2004 Ordinance Is Not Unconstitutionally Underinclusive

The remainder of the FACC’s allegations essentially claim that the 2004 ordinance is unconstitutionally underinclusive, both because it does not ban all off-site signs and also because it allows grandfathered billboards to be relocated in the City *and/or modified* to include larger, nonstatic digital displays—thus undermining the City’s stated purposes in enacting the 2004 ordinance of improving traffic safety and the City’s appearance or aesthetics. Laws regulating speech are unconstitutionally underinclusive if they contain exceptions ““that bar one source of a given harm while specifically exempting another,”” particularly when the exceptions ensure that the regulation will ““fail to achieve”” or will not ““materially advance”” its purposes. (*Metro Lights, LLC v. City of Los Angeles* (9th Cir. 2009) 551 F.3d 898, 906.)

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(*Lamar, supra*, 245 Cal.App.4th at p. 627, quoting *Reed v. Town of Gilbert, supra*, 576 U.S. at p. \_\_\_\_ [135 S.Ct. at pp. 2227, 2230].) The 2004 ordinance does not ban new billboards or permit grandfathered billboards based on their topics discussed or their specific subject matter.

The FACC alleged, and the AMG defendants claim, that the 2004 ordinance is so riddled with exceptions, both on its face and as applied to grandfathered billboards, that it cannot satisfy the third prong of the four-prong intermediate scrutiny test established in *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm.* (1980) 447 U.S. 557 (*Central Hudson*), as applied to an off-site billboard ban in *Metromedia, supra*, 453 U.S. at page 510 for determining whether a noncontent based restriction on commercial speech violates the First Amendment (*Lamar, supra*, 245 Cal.App.4th at pp. 616-617 [discussing *Metromedia* and *Central Hudson*]; *AMG I, supra*, 244 Cal.App.4th at pp. 303-305 & fn. 9 [same]). *Central Hudson* established a four-prong test for determining whether a governmental restriction on commercial speech is constitutional, which was summarized in *Metromedia* as follows: “The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.” (*Metromedia, supra*, at p. 507; *Central Hudson, supra*, at pp. 563-566.)

In *Metromedia*, a four-justice plurality of the high court held that the portion of the City of San Diego’s ordinance that banned off-site commercial billboards readily satisfied the first, second, and fourth *Central Hudson* criteria. (*Metromedia, supra*, 453 U.S. at pp. 507-508.) The plurality explained: “There is no suggestion that the commercial advertising at issue here involves unlawful activity or is misleading. Nor can

there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals. It is far too late to contend otherwise with respect to either the traffic safety . . . or esthetics . . . . Similarly, we reject appellants’ claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the *Central Hudson* test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends.” (*Ibid.*, fn. omitted).)

The *Metromedia* plurality considered the “more serious question” to be the third *Central Hudson* criterion—whether the City of San Diego’s off-site commercial billboard ban “directly advanced” the city’s stated interests in enacting the ban of improving traffic safety and the city’s appearance or aesthetics. (*Metromedia*, *supra*, 453 U.S. at p. 508.) On this question, the plurality rejected the appellant’s argument that the record was inadequate to show that the city’s commercial billboard ban improved city traffic safety and aesthetics. (*Ibid.*) Instead, the plurality deferred to the city’s legislative judgment, and the judgment of many reviewing courts, including the California Supreme Court in the underlying case, that “billboards are real and substantial hazards to traffic safety” and can be perceived as an ““esthetic harm””—particularly when nothing in the record showed that these legislative and judicial judgments were false or unreasonable. (*Id.* at pp. 509-510.)

The *Metromedia* plurality affirmed the California Supreme Court’s holding in the underlying case that, “‘*as a matter of law . . . an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.*’” (*Metromedia, supra*, 453 U.S. at p. 508, quoting *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 859, italics added.) As the plurality observed, the California Supreme Court had “noted the meager record on this point” (*Metromedia, supra*, at p. 508) but had also noted that “[billboards] are intended to, and undoubtedly do, divert a driver’s attention from the roadway” (*id.* at pp. 508-509, quoting *Metromedia Inc. v. City of San Diego, supra*, at p. 859). The plurality agreed with the proposition adopted by the California Supreme Court and “many other courts” that, “a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside.” (*Metromedia, supra*, at p. 509.) The plurality also said it was “not speculative to recognize” that billboards “can be perceived as an ‘esthetic harm.’” (*Id.* at p. 510.) The plurality thus concluded that the San Diego ordinance met the four-prong intermediate scrutiny test of *Central Hudson*—to the extent the ordinance banned off-site commercial billboards. (*Metromedia, supra*, at pp. 508-510.)

The AMG defendants claim the City failed to meet its initial burden, in moving for summary judgment on the FACC, of showing that the AMG defendants could not prove that the 2004 ordinance was unconstitutionally underinclusive in that the ordinance could not meet the intermediate scrutiny test of *Central Hudson*. We disagree. The City made a *prima facie* showing that the 2004 ordinance satisfied each part of the four-part *Central*

*Hudson* test, for the same reasons that San Diego’s off-site billboard ban met the *Central Hudson* test in *Metromedia*. (*Metromedia*, *supra*, 453 U.S. at pp. 507-511.)

As noted, the City adduced the 2004 ordinance, along with chapter 17.74 of the CMC, which collectively showed that the 2004 ordinance did not ban *all* off-site signs in addition to banning new off-site billboards. For example, the 2004 ordinance did not ban and the CMC still permitted a variety of signs, including, “[d]irectional signs” and “[p]olitical signs.” (CMC, §§ 17.74.030(20), (47), 17.74.070(A), (M).) The City also adduced evidence that it had not allowed any grandfathered billboards to be relocated in the City or modified to include a larger digital display, except as permitted pursuant to a relocation agreement with the City.

The City also showed that its stated purposes in enacting the 2004 ordinance included improving traffic safety and city aesthetics. As discussed, under *Metromedia*, a city’s legislative judgment that an off-site billboard ban will “directly advance” a city’s stated goals of improving traffic safety and aesthetics is entitled to judicial deference, unless the record shows the legislative judgment is false or unreasonable. (*Metromedia*, *supra*, 453 U.S. at pp. 507-511.) By showing the 2004 ordinance was enacted to improve traffic safety and aesthetics, the City made a *prima facie* showing that the AMG defendants could not prove their underinclusivity claims under *Metromedia* and *Central Hudson*. This shifted the burden to the AMG defendants to show the 2004 ordinance was unconstitutionally underinclusive because, under *Metromedia* and *Central Hudson*, it did not, in fact, “directly advance” the City’s stated goals of improving traffic safety and

aesthetics. (*Metromedia, supra*, at pp. 508-511; *Aguilar, supra*, 25 Cal.4th at pp. 849-850.) The AMG defendants adduced no such evidence.<sup>10</sup> Thus, the FACC’s underinclusivity claims were properly adjudicated in favor of the City. (Code Civ. Proc., § 437, subd. (f).)

The AMG defendants argue the City had the initial burden of producing evidence, in the form of traffic safety studies or similar evidence, showing that the 2004 ordinance “directly advanced” the City’s stated purposes of improving traffic safety and aesthetics. They also claim the City did not and could not meet this burden, because allowing grandfathered billboards to be relocated in the City and/or modified to include larger digital displays, as the City had done with Lamar, is directly at odds with and undermines the City’s stated goals of improving traffic safety and city aesthetics.

*Metromedia* has settled these claims, in favor of the City and adversely to the AMG defendants, as a matter of law. As discussed, under *Metromedia*, a city’s legislative judgment that an off-site billboard ban will advance the city’s interest in traffic safety and aesthetics is “manifestly reasonable,” absent evidence to the contrary.

(*Metromedia, supra*, 453 U.S. at pp. 508-510.) Thus, under *Metromedia*, the City did not

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<sup>10</sup> In opposing the City’s motion for summary judgment on the FACC, the AMG defendants adduced the declaration of J. Keith Stephens, the chief executive officer of COEP, AMG’s joint venture partner in building and operating the AMG billboard and other billboards in the City. (See fn. 5, *ante*.) The trial court sustained objections Nos. 5 through 15 of the City’s 22 objections to Mr. Stephens’s declaration, and the AMG defendants do not challenge these rulings in this appeal. Nonetheless, nothing in Mr. Stephens’s declaration shows that the 2004 ordinance does not “directly advance” the City’s stated goals of improving traffic safety and aesthetics. (*Metromedia, supra*, 453 U.S. at p. 508.)

have the burden of adducing traffic safety studies or similar evidence, affirmatively showing the 2004 ordinance *actually* improved traffic safety and aesthetics, as part of the City’s initial burden of production.

Cases following *Metromedia* are in accord. In *Ackerley Communications of the Northwest v. Krochalis* (9th Cir. 1997) 108 F.3d 1095, the court considered whether the City of Seattle had the burden of making a “factual showing” that its ordinance limiting the construction and relocation of billboards directly advanced the city’s stated purposes of improving traffic safety and aesthetics. (*Id.* at pp. 1096-1097.) The court reasoned that *Metromedia* controlled, and the city thus had no burden of adducing “detailed proof,” in support of its motion for summary judgment, that its billboard ordinance “will in fact advance the city’s interests.” (*Ackerly Communications of the Northwest v. Krochalis, supra*, at pp. 1097-1100.)

More broadly, the Ninth Circuit Court of Appeals and our appellate court colleagues in *Lamar* have rejected a series of underinclusivity challenges to the City of Los Angeles’s 2002 ban on off-site billboards, similar to the AMG defendants’ underinclusivity challenge to the 2004 ordinance. (*Lamar, supra*, 245 Cal.App.4th at p. 631 [“A regulation is not underinclusive simply because it has exceptions.”]; *Lamar, supra*, at pp. 615-616, 630-633; *Metro Lights, LLC v. City of Los Angeles, supra*, 551 F.3d at pp. 900, 902 [the city did not violate the 1st Amend. “by prohibiting most offsite commercial advertising while simultaneously contracting with a private party to permit sale of such advertising at city-owned transit stops” (of which there were approximately

18,500)]; *World Wide Rush, LLC v. City of Los Angeles* (9th Cir. 2010) 606 F.3d 676, 679, 686-687, 690 [the city’s ban on freeway-facing billboards was not an unconstitutionally underinclusive restriction on commercial speech; the exceptions to the ban for billboards at Staples Center and in a special use district did not undermine the city’s traffic safety and aesthetics objectives]; *Vanguard Outdoor, LLC v. City of Los Angeles* (9th Cir. 2011) 648 F.3d 737, 745 [the city’s distinction between off-site and on-site signs “has been repeatedly upheld as content-neutral and valid.”]; see *Vanguard Outdoor, LLC v. City of Los Angeles, supra*, at pp. 746-748.)

The AMG defendants’ reliance on *Desert Outdoor Advertising v. City of Moreno Valley* (9th Cir. 1996) 103 F.3d. 814 is misplaced. In that case, the Ninth Circuit invalidated the City of Moreno Valley’s sign ordinance on First Amendment grounds in part because the city did not show it had “a substantial governmental interest that satisfies . . . the *Central Hudson* test.” (*Id.* at p. 819.) But unlike the 2004 ordinance, which expressly states it was enacted to improve traffic safety and aesthetics, the Moreno Valley ordinance “lacked any statement of purpose” and the city provided *no evidence* that its ordinance promoted traffic safety or aesthetics, which *Metromedia* recognized are substantial governmental interests. (*Metromedia, supra*, 453 U.S. at p. 507.)

The AMG defendants generally claim that the City has shown “unfair favoritism toward Lamar” and has enforced the 2004 ordinance in an unlawfully discriminatory manner by entering into relocation agreements with Lamar for its grandfathered billboards, while “wrongfully refus[ing]” to enter into a similar relocation agreement with

the AMG defendants for the AMG billboard. But the undisputed evidence shows that Lamar owned several grandfathered off-site billboards and entered into relocation agreements with the City to relocate those billboards. The AMG billboard was not a grandfathered billboard. Thus, the City did not “wrongfully” refuse to enter into a relocation agreement with the AMG defendants for the AMG billboard. Additionally, both the CMC and the OAA authorized the City to negotiate and enter into relocation agreements with the owners or operators of *grandfathered billboards*, including Lamar. (Bus. & Prof. Code, § 5412; CMC, § 17.74.070(H); *AMG I, supra*, 244 Cal.App.4th at p. 302.)<sup>11</sup>

*B. The Disgorgement Penalties Must Be Stricken from the Judgment*

The OAA authorizes a city to enforce (impose and collect) penalties for placing or maintaining an “advertising display” without a valid state permit. (§ 5485, subds. (b)-(d).) Section 5485, subdivision (c) of the OAA provides: “In addition to the penalties set

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<sup>11</sup> Based on Mr. Stephens’s declaration (see fn. 9, *ante*), the AMG defendants assert they “acquired the right to remove three grandfathered billboards from the City, but the City indicated that it was unwilling to negotiate a relocation agreement with [the AMG defendants] on terms similar to those offered to Lamar.” Mr. Stephens’s declaration *does not* state that he, COEP, or any of the AMG defendants had either purchased or acquired the right to operate any billboards in the City. Instead, Mr. Stephens’s declaration states that Mr. Stephens had “personally *negotiated* an agreement on behalf of [COEP] to remove three grandfathered billboards from within the City’s jurisdiction” (*italics added*) and he “was prepared to do so if permitted to ‘relocate’ the signs as electronic ones in a manner similar to that the City [*sic*] has allowed Lamar to do eight separate times.” Thus, Mr. Stephens’s declaration does not support the AMG defendants’ claim that the City was refusing to relocate a grandfathered billboard that was either owned or operated by any of the AMG defendants, COEP, or Mr. Stephens.

forth in subdivision (b), the gross revenues from the unauthorized advertising display *that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged.*” (Italics added.)<sup>12</sup>

In addition to making Garcia and AMG jointly and severally liable to the City for penalties pursuant to section 5485, subdivision (b),<sup>13</sup> the judgment requires AMG and Garcia, jointly and severally, to pay the City “disgorgement of gross revenues received by or owed to them pursuant to Business and Professions Code section 5485, subdivision (c), in the sum of \$106,257.52 (i.e., for the 202 days the two advertisements were illegally displayed from December 7, 2014 through June 27, 2015, at the contracted advertising rate of \$8,000.00 per face, per month), with Rockefellas jointly and severally liable for one-half of that sum (i.e., \$53,128.76 for the 202 days the Rockefellas advertisement was displayed . . . ).”

The AMG defendants claim this part of the judgment must be reversed because the undisputed evidence adduced on the City’s motion for summary judgment on the FAC shows that no gross revenues, or monies, were ever *received by or owed to* AMG for the advertising displays on the unpermitted AMG billboard. (§ 5485, subd. (c).) We agree.

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<sup>12</sup> For purposes of the OAA, an “[a]dvertising display” refers to “advertising structures” and “signs” (§ 5202), and “[a]dvertising structure” means a structure of any kind or character erected, used, or maintained for outdoor advertising purposes . . .” (§ 5203). A “[p]erson” includes a “natural person, firm, cooperative, partnership, association, limited liability company, and corporation.” (§ 5219.)

<sup>13</sup> See footnote 7, *ante*.

In support of its motion on the FAC, the City adduced undisputed evidence that, from the time the AMG billboard was erected over the weekend of December 7 and 8, 2014, through June 27, 2015, one side of the AMG billboard featured an advertisement for Rockefellas, a bar located in the City and primarily owned by Garcia, and the other side featured an advertisement for Pala, a casino located in Fallbrook. The City also adduced excerpts from the April 2015 deposition testimony of Garcia, in which he averred that (1) Pala and Rockefellas each agreed to pay and entered into written agreements to pay AMG \$8,000 per month for placing their respective advertisements on the AMG billboard, but (2) as of April 2015, neither he (Garcia) nor AMG had received any monies from Pala or Rockefellas for the advertising. The City also adduced the two written agreements, one signed by AMG and Rockefellas, and the other by AMG and Pala, by which Rockefellas and Pala each agreed to pay AMG \$8,000 per month for the advertising.

In opposition, the AMG defendants adduced a declaration by Garcia, signed in February 2017, in which he claimed that, after the trial court issued the January 23, 2015, preliminary injunction against all defendants, including Rockefellas and Pala, he “*agreed on behalf of AMG to rescind the two contracts . . . and agreed that no money whatsoever was owed*” for the advertising. (Italics added.) In granting the City’s motion for summary judgment on the FAC, the trial court sustained the City’s objections to Garcia’s declaration, “relating to the rescission of the advertising contracts with Rockefellas and

Pala” on the grounds it was “self-serving,” contradicted Garcia’s prior deposition testimony, lacked foundation, and was irrelevant.

The AMG defendants claim this evidentiary ruling was in error because Garcia consistently averred, both in his declaration and prior deposition testimony, that neither he nor AMG had ever *received* any monies for the advertising. Thus, they argue, Garcia’s declaration did not contradict his prior deposition testimony, and was supported by sufficient foundational facts. We agree.

We review a trial court’s rulings on the admissibility of evidence for an abuse of discretion. (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 841-842.) A party cannot create a triable issue of fact by contradicting his or her prior deposition testimony or admissions. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196 [““[A]dmissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment.””]; cf. *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 144-147 [prior admissions may be contradicted or amended when discrepancy may be credibly explained].) The exclusion of Garcia’s declaration was an abuse of the court’s discretion, because Garcia’s declaration did not, in fact, contradict his prior deposition testimony.

In his April 2015 deposition, Garcia testified that Pala and Rockfellas were refusing to pay AMG for the advertising because the City was issuing administrative citations to them, and for that reason he, Garcia, agreed that Pala and Rockfellas “were justified” in not paying for the advertising. In his February 2017 declaration, Garcia

averred that no monies had been received by or were owed to AMG for the advertising because AMG had *rescinded* its advertising contracts with Pala and Rockefellas. Thus, Garcia's declaration was entirely consistent with his prior deposition testimony. Garcia's declaration was also supported by sufficient evidentiary foundation: The record shows that Garcia, in his capacity as AMG's chief executive officer, negotiated AMG's advertising contracts with Pala and Rockefellas and that Garcia also rescinded those contracts on AMG's behalf after the preliminary injunction was issued in January 2015. Thus, Garcia's declaration should have been admitted.

Further, no evidence contradicted Garcia's deposition testimony or declaration. That is, no evidence showed that the advertising contracts *had not* been rescinded or that any of the AMG defendants had ever "received" or was "owed" any gross revenues, or monies, for the unlawful advertising displays. (§ 5485, subd. (c).) To the contrary, all of the *admissible* undisputed evidence adduced on the City's motion on the FAC shows that no "gross revenues" or monies for the advertising displays had ever been "received by" or was "owed to" any of the AMG defendants.<sup>14</sup>

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<sup>14</sup> To be sure, the undisputed evidence shows that the two advertising displays were unlawfully in place for 202 days, and that the value of each advertising display was \$8,000 per month. Thus, Pala and Rockefellas each received the full \$8,000 monthly value of their advertising displays for 202 days. But section 5485, subdivision (c) does not authorize the disgorgement of the "value" of an unauthorized advertising display. To the contrary, the statute provides: "[T]he gross revenues from the unauthorized advertising display *that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged.*" (§ 5485, subd. (c), italics added.) The plain language of a statute establishes what the Legislature intended the language to mean, and when, as here, the language is clear and unambiguous, there is no need to resort to extrinsic indicia of the Legislature's intent. (*Jarrow Formulas, Inc. v.*

Thus, the judgment must be amended to strike the disgorgement penalties—that is, the portion of the judgment making AMG and Garcia jointly and severally liable to the City for \$106,257.52, and making Rockefellas jointly and severally liable with AMG and Garcia for half of that amount, or for \$53,128.76. (§ 5485, subd. (c).)

## V. DISPOSITION

The matter is remanded to the trial court with directions to modify the judgment to strike the disgorgement penalties imposed pursuant to section 5485, subdivision (c)—the portion making AMG and Garcia jointly and severally liable to the City for \$106,257.52, and making Rockefellas jointly and severally liable with AMG and Garcia for half of that amount, or for \$53,128.76. The judgment is affirmed in all other respects. Each party shall bear their costs on appeal. (Cal. Rules of Court, rule, 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS

J.

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*[footnote continued from previous page]*

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*LaMarche* (2003) 31 Cal.4th 728, 736.) The language of section 5485, subdivision (c), including its uses of the terms “gross revenues” and “received by, or owed to,” is clear and unambiguous, and the statute does not authorize the disgorgement of the *value realized*, by any person, from an unauthorized advertising display.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.